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No. 95-928

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JOHN W. ATHERTON, JR.,

Appellant,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,
in its capacity as
receiver for CITY SAVINGS, F.S.B,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE JOSEPH IARIA, DORIS HALL, WILLIAM HADLEY, ROGER LANE, RAYMOND TAYLOR, JACQUELINE PAPPAS, IRENE KRAMER, LEONARD LOMELL, RICHARD SUTTON, DAVID JOHNSON, RICHARD SAMBOL, JACK MEYER, JOHN FELLOWS AND WILLIAM HIERING ADVOCATING REVERSAL OF THE OPINION BELOW

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INTEREST OF AMICI CURIAE

Prior to the passage of the Financial Institution Reform and Recovery Act of 1989 ("FIRREA"), the First

National Bank of Toms River (the "Bank" or "FNBTR") adopted an insulating provision in its articles of association that gives amici curiae a unique interest in this appeal from the Third Circuit's decision in Resolution Trust Corp. v. Cityfed Financial Corp., 57 F.3d 1231 (3d Cir. 1995) ("Cityfed"). Amici curiae are former directors and officers of the FNBTR who are defendants in a suit captioned Federal Deposit Insurance Corporation v. Iaria, et al., civil action number 94-2455 (MLP), pending in the United States District Court of the District of New Jersey. The Federal Deposit Insurance Corporation ("FDIC"), in its capacity as the FNBTR's receiver, has sued the Bank's directors and officers claiming that amici curiae approved certain loans in a manner that was negligent and/or grossly negligent. In response to the action commenced against them by the FDIC, amici curiae have asserted as a defense that the FDIC's claims fail due to the insulating provision in the FNBTR's articles of association which protects them against claims of negligence, gross negligence and breach of fiduciary duty. Amici curiae presently have a dispositive motion pending before the District of New Jersey on these grounds.

The Third Circuit based its interpretation of FIRREA on the assumption that only state banks insulated their directors pursuant to state law. The Third Circuit reasoned because § 1821(k) of FIRREA was meant to curtail the protections afforded by state insulating statutes, it follows that Congress did not intend this section of FIRREA to apply to federal banks. Applying this reasoning to the FNBTR leads to a questionable result -- a literal application of the Court's holding would mean that § 1821(k) had no effect on the insulating provisions adopted by the FNBTR.

SUMMARY OF ARGUMENT

Amici curiae advocate the reversal of the opinion rendered by the United States Court of Appeals for the Third Circuit in Resolution Trust Corp. v. Cityfed Financial Corp., 57 F.3d 1231 (3d Cir. 1995), because its reasoning cannot be reconciled with the fact that federally-chartered institutions adopted provisions insulating their directors and officers against claims of negligence, gross negligence and breach of the fiduciary duty of due care. Amici curiae believe that the Third Circuit erred in holding that federal common-law governs the liability of the directors and officers of federally-chartered banks. Contrary to the Third Circuit's opinion, a single body of law controls the tort liability of both state- and federally-chartered banks -- the law of the state where the conduct at issue occurred. State tort law controls except insofar as Congress has pre-empted state law or the Bank itself has agreed not to assert certain claims against its directors and officers.

Amici curiae submit this brief to place before the Court an issue not apparent in the record below and which the Third Circuit failed to consider -- that prior to the passage of FIRREA federally-chartered institutions adopted provisions in their articles of association equivalent to a state insulating statute. The FNBTR's insulating provision bars claims by the Bank against its officers and directors for alleged negligence, gross negligence and breach of fiduciary duty. The Third Circuit failed to consider this possibility when it reasoned that § 1821(k) applies only to state banks because Congress adopted § 1821(k) solely to pre-empt insulating statutes adopted by state legislatures with respect to state-chartered institutions. When one considers that federal banks achieved the same protection by amending their articles of association, the Third Circuit's opinion leads to the questionable result that Congress intended to pre-empt the insulation of directors and officers of state banks but not of federal banks. A more

consistent approach would apply § 1821(k) to both state and federal banks, with the understanding that the tort liability of each is controlled by state law. This has the added benefit of being consistent with O'Melveny & Myers v. FDIC, 512 U.S. ___, 129 L.Ed.2d 67, 114 S.Ct. 2048 (1994).

ARGUMENT

I. THE THIRD CIRCUIT ERRED IN RECOGNIZING THE EXISTENCE OF A FEDERAL COMMON-LAW CAUSE OF ACTION.

The Third Circuit's opinion rests on the fallacious assumption that there is a "federal common law" governing the liability of directors and officers of federally-chartered banks. To the contrary, "[t]here is no federal general common law," Erie R. Co. v. Tomkins, 304 U.S. 64, 78, 82 L.Ed. 1188, 58 S.Ct. 817 (1938), and there is no basis for the Third Circuit's creation of federal common-law causes of action against the directors and officers of federally-chartered banks. In O'Melveny, another suit brought by the FDIC as receiver of a failed bank, this Court rejected the FDIC's attempt to supplant state law with respect to the imputation of corporate officers' knowledge to the corporation. The Court concluded that the Financial Institution Reform and Recovery Act ("FIRREA") places "the FDIC in the shoes of the insolvent [bank], to work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." 129 L.Ed.2d at 75. Accordingly, state law governs the liabilities of directors and officers of both state-chartered and federally-chartered banks, except insofar as the bank has insulated the directors and officers from liability or Congress has pre-empted either state law or that insulation.

II. THE THIRD CIRCUIT ALSO ERRED WHEN IT RULED THAT § 1821(k) DOES NOT APPLY TO OFFICERS AND DIRECTORS OF FEDERALLY-CHARTERED BANKS.

The Third Circuit also erred when it held that "§ 1821(k) was simply not enacted to define the standard of care applicable to federally chartered institutions governed by federal common law." 57 F.3d at 1246. To the contrary, amici curiae contend that Congress intended § 1821(k) to define the minimum standard of care applicable to all banks irrespective of their charter as of the date of its adoption.[1] The Third Circuit in part avoided this result by holding that § 1821(k) has no application to federally-chartered banks. That reasoning, however, wrongly assumes that federally-chartered banks did not adopt provisions into their articles of association.

1 The Third Circuit further held that § 1821(k) did not pre-empt any claims against directors and officers based on claims arising from conduct less culpable than gross negligence (i.e., claims for simple negligence and breach of fiduciary duty). 57 F.3d at 1246. This result conflicts with the holdings of the Fifth, Sixth, Seventh and Tenth Circuits. See RTC v. Miramon, 22 F.3d 1357 (5th Cir. 1994); RTC v. Bates, 42 F.3d 369 (6th Cir. 1994); RTC v. Gallagher, 10 F.3d 416 (7th Cir. 1993); RTC v. Frates, 52 F.3d 295 (10th Cir. 1995). However, this ruling should not affect insulated directors and officers, who are absolved of liability for negligence and breach of fiduciary duty by virtue of their insulation.

A. Consistent with the OCC's Interpretative Letters, Federally-Charted Banks Adopted Insulating Provisions in their Articles of Association.

Prior to the passage of FIRREA, federal banks were permitted to adopt insulating provisions into their articles of association. Pursuant to the National Bank Act, a federally-chartered bank may adopt any provision that is "not inconsistent with law, [and] which the Association may see fit to adopt for the regulation of its business and the conduct of its affairs." 12 U.S.C. § 21. Thus, a national bank may adopt any protections available under state law unless it "infringe[s] [upon] the National Banking Laws or impose[s] an undue burden on the performance of the bank's functions." Anderson National Bank v. Luckett, 321 U.S. 233, 248, 88 L.Ed.2d 692, 64 S.Ct. 599 (1944). The FNBTR, the bank for which amici curiae served as directors and officers, adopted the following provisions in their articles of association insulating them from liability for claims of negligence, gross negligence and breach of fiduciary duty:

> A director shall not be personally liable to [the FNBTR] or its shareholders for damages for breach of any duty owed to [the FNBTR] or its shareholders, except for liability for any breach of duty based upon an act or omission (i) in breach of such person's duty of loyalty to [the FNBTR] or its shareholders, (ii) not in good faith or involving a knowing violation or law or (iii) resulting in receipt by such person of an improper personal benefit.

Articles of Association of the First National Bank of Toms River, Article Tenth (eff. June 24, 1987). This provision was

based upon similar protection afforded by New Jersey and many other states. See, e.g., N.J.S.A. 17:9A-3; N.Y. Bus. Corp. §402(b); Del. Code Ann. §102(b)(7); Fla. Stat. Ann. §607.0830.

At the time such provisions were adopted, national banks asked the Office of the Comptroller of the Currency ("OCC") for its position with respect to these insulating provisions, and after consideration the OCC declined to object to them. See OCC Interpretative Letter No. 483 (May 24, 1989) (reprinted in Fed. Banking L.Rp. (CCH), ¶83,048) (the OCC "does not object" to inclusion of such protections in a bank's Articles of Association); OCC Interpretative Letter No. 456 (May 6, 1988) (reprinted in Fed. Banking L.Rp. (CCH), ¶85,680) (the OCC "has no formal policy with respect to the adoption of [state law] standards by national banks" and it will amend its interpretative rulings on indemnification "to prohibit [the] adoption of such standards" if it determines that they are inconsistent with federal law). In addition, the OCC has expressly authorized national banks to indemnify directors and officers for simple negligence and for payment of director and officer liability insurance premiums. See 12 C.F.R. 7.5217(a), (d). The express authorization to indemnify for negligence is the substantive equivalent of agreeing not to sue directors and officers for simple negligence. Accordingly, the FNBTR and many other national banks validly adopted insulating provisions into the articles of association.

B. The Third Circuit Erred by Limiting § 1821(k) to State-Chartered Banks.

The Third Circuit reasoned that Congress enacted § 1821(k) "for the [sole] purpose of pre-empting state insulating statutes." 57 F.3d at 1246. The Third Circuit did not comprehend the fact that national banks can and did achieve

the same result through the adoption of insulating provisions into their articles of association.

This error must be reversed. The liabilities of directors and officers of both national and state banks are governed by state law, except to the extent that the bank insulates its directors and officers or Congress pre-empts state law or the insulation. In § 1821(k), Congress pre-empted the insulation of both state and federal bank directors and officers for claims accruing as of the date of the statute's enactment. To hold otherwise leads to the questionable conclusion that Congress deliberately distinguished between state- and federally-chartered bank directors and officers, pre-empting the insulation of one category but not of the other. Accordingly, directors and officers such as amici curiae who received the benefit of insulation (whether through state law or the bank's articles of association) may not be sued for claims accruing prior to § 1821(k)'s enactment for insulated conduct. Moreover, those insulated directors and officers cannot be sued for claims accruing after the enactment of § 1821(k) for culpability less than the gross negligence standard prescribed in that statute because they remain insulated from those claims.

CONCLUSION

For the reasons set forth above, the Third Circuit's opinion in Cityfed should be reversed.

Respectfully submitted,

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Dated: June 27, 1996

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NATIONAL BANKS

[¶ 85,680] Amending National Bank Articles of Association to Limit Liability of Its Directors under State Law.

Daniel N. Goldstein, Attorney, Securities & Corporate Practices Division. Interpretive Letter No. 456, May 6, 1988. Interpreting 12 USC 73 (¶ 62,010), 12 USC 93(a) (¶ 11,403).

This will acknowledge receipt of your April 11, 1988 letter and will confirm our April 6, 1988 telephone conversation concerning the Bank's proposal to amend its Articles of Association to limit the liability of its directors. You represented that the Maryland General Assembly recently enacted a statute which permits state chartered banks and corporations to limit the personal liability of their directors. You requested advice on whether the Bank may amend its Articles to take advantage of the standards set forth in the new law.

In our telephone conversation, I advised that the OCC is currently assessing whether laws such as the new Maryland law is consistent with the national banking laws, and, in particular, with 12 U.S.C. §§ 73, 93(a) and 1818. At this time, however, the OCC has no formal policy with respect to the adoption of these standards by national banks. Accordingly, the Bank and Bank counsel should make a determination as to whether this standard is appropriate and consistent with the national banking laws. By not objecting at this time to the Bank's adoption of these provisions, the OCC in no way waives its right to bring an action under U.S.C. §§ 93(a) or 1818 for conduct which involves a breach of a Bank director's common law duty of care. You should note that bank directors may have an even higher standard of care than other corporate directors.

If the Bank chooses to ask shareholders to vote on the adoption of these amendments, it must make full and accurate disclosure of all material facts. At a minimum, the Bank should provide to its shareholders the following disclosure concerning the proposed adoption of the standards limiting director liability set forth in the new Maryland statute:

(1) The OCC currently is assessing whether laws such as the new Maryland statute, including certain provisions contained therein, is consistent with the national banking laws, including, *inter alia*, 12 U.S.C. §§ 73, 93(a) and 1818.

(2) In the event the new law is deemed inconsistent with the national banking laws, the OCC may:

(a) amend the interpretive ruling on indemnification (12 C.F.R. § 7.5217) to prohibit adoption of such standards; and/or

(b) require national banks which have altered their Articles of Association in accordance with the new state law to suspend any contemplated action under their present Article and to adopt an Article consistent with the national banking laws;

(3) An explanation of the reasons for the Bank's adoption of the standard limiting liability; and

(4) A discussion of any difficulty which the Bank has had in obtaining director and officer liability insurance and the reasons for the difficulty.

Please note further that any amendment to the Bank's Articles of Association which alters the Bank's indemnification standard must contain the limitations set forth in 12 C.F.R. § 7.5217.

I trust this is responsive to your request. If you have any questions, please do not hesitate to contact Sue E. Auerbach, Attorney, Securities & Corporate Practices Division, at (202) 447-1954.

CONTROL

[¶ 85,681] Outstanding Common Stock Acquisition Through Foreclosure and the Prior Notice Requirement of the Change in Bank Control Act.

Donald N. Lamson, Assistant Director, Securities & Corporate Practices Division. Interpretive Letter No. 457, August 8, 1988. Interpreting 12 USC 1817(j) (¶ 47,269); 12 CFR 5.50 (¶ 60,514).

This is in response to your letter of May 25, 1988, in which you provided your opinion that an acquisition of 87% of the Bank's outstanding common stock through foreclosure of a promissory note would not trigger the prior notice requirements of the Change in Bank Control Act of 1978 ("Act"), 12 U.S.C. § 1817(j). You stated that a violation of the Act would not arise because any acquisition of control would result from foreclosure of a debt previously contracted in good faith which, by regulation, is exempt from the Act's prior notice requirements. *See* 12

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DIRECTOR LIABILITY

[¶ 83,048] Personal Liability for Monetary Damages for Breach of Duty as a Bank Director.

Ellen Broadman, Assistant Director, Securities and Corporate Practices Division. Interpretive Letter No. 483, May 24, 1989. Interpreting 12 USC 73 (¶ 62,010), 12 USC 93 (¶ 11,403), 12 USC 1818 (¶ 47,271), 12 CFR 7.5217 (¶ 60,884).

This relates to your letter of February 25, 1989, asking that the Comptroller review a copy of a resolution the Bank's Board of Directors intends to adopt at the next annual meeting in May.

The proposed resolution provides that a director of the Bank shall not be personally liable to the Bank, its shareholders or the Comptroller of the Currency for monetary damages for breach of duty as a director except for the following:

(a) transactions in which the director's personal financial interest is in conflict with the financial interest of the Bank or its shareholders;

(b) acts or omissions which are not in good faith, which involve intentional misconduct or which are known to the director to be violations of law; or

(c) transactions described in KRS 271B.8-330 (liability for unlawful distributions to shareholders), or for any transaction from which the director derived an improper personal benefit.

As a general matter, the OCC does not review proposed amendments to a bank's Articles of Association. The Comptroller currently is considering whether certain types of director liability provisions are consistent with the national banking laws, including, *inter alia*, 12 U.S.C. §§73, 93(a) and 1818. At this time, the Comptroller does not object to the adoption in a bank's Articles of Association of director liability provisions which substantially reflect the law of the state where the bank is located, provided these Articles do not contravene the limitations contained in 12 C.F.R. §7.5217 or interfere with the Comptroller's exercise of its supervisory responsibilities. In this regard, we believe that the proposed resolution is impermissible to the extent that it directly limits the personal liability of directors of the Bank in actions brought by the Comptroller of the Currency.

Under 12 C.F.R. §7.5217(b), a director may not be indemnified against expenses, penalties, or other payments incurred in an administrative proceeding or action instituted by the Comptroller which results in a final order assessing civil money penalties or requiring affirmative action by an individual or individuals in the form of payments to the bank. Under 12 C.F.R. §7.5217(c), the Comptroller may review the threat to bank safety and soundness posed by indemnification standards and direct modification of a specific indemnification through appropriate administrative action. Under 12 C.F.R. §7.5217(d), Articles providing for the payment of premiums for insurance covering the liability of directors shall explicitly exclude insurance coverage for a formal order assessing civil money penalties against a director. Although these regulations cover indemnification and insurance provisions and do not address direct provisions limiting the liability of directors, any Article, such as the proposed one, which has the effect of limiting the Comptroller's ability to either pursue civil money penalties, require a director to make affirmative payments to the bank, or bring an action under 12 U.S.C. §§93(a) or 1818 for conduct which involves a breach of the director's common law duty of care, would appear to be inconsistent with the limitations of 12 C.F.R. §7.5217 and to interfere with the Comptroller's exercise of its supervisory responsibilities. You should note that bank directors may have an even higher standard of care than other corporate directors.

With the exceptions noted above, the OCC takes no position on the adoption of the proposed resolution provided the Bank makes full and accurate disclosure to its shareholders of all material facts. By taking no position at this time on the Bank's adoption of parts of the proposed resolution, the OCC in no way waives its right to bring appropriate actions based on Bank director's breach of duties as director.

Any change in the Bank's liability standards must be effected through an amendment to the Bank's Articles of Association. At a minimum, the Bank should provide to its shareholders the following disclosures if it seeks a vote on the portions of the proposed resolutions on which the OCC has taken no position:

(1) The OCC is currently assessing whether certain types of director liability provisions are consistent with the national banking laws, including, *inter alia*, 12 U.S.C. §§73, 93(a) and 1818;

(2) In the event that director liability standards, or portions thereof, are deemed inconsistent with national banking laws, the Comptroller may:

(a) amend 12 C.F.R. §7.5217 to prohibit adoption of such provisions; and/or

(b) require a bank which has altered its Articles of Association in accordance with state law to suspend any contemplated action under its present Article and to adopt an Article consistent with the national banking laws;

(3) An explanation of the reasons for the Bank's adoption of the standard limiting director liability; and

(4) A discussion of any difficulty which the Bank has had in obtaining director and officer liability insurance and the reasons for the difficulty.

OFFICER INDEMNIFICATION

[¶ 83,049] Indemnification of Officers for Judgments, Fines, Settlements, and Expenses.

Elizabeth S. Malone, Attorney, Securities and Corporate Practices Division. Interpretive Letter No. 484, June 20, 1989. Interpreting 12 CFR 7.5217 (¶ 60,884).

This is in response to your letter of April 11, 1989 in which you requested information concerning the OCC's interpretation of 12 C.F.R. §7.5217.

In that letter you stated that your client is an officer of a national bank, but not a director, and that he also is not an officer or director of the bank holding company which owns 100 percent of the outstanding equity securities of the bank. The holding company is incorporated under Delaware law. In 1988, the bank amended its Articles of Association to provide for indemnification along the lines authorized by Section 145 of the Delaware General Corporation law.

You further stated that the Articles provide that the bank shall indemnify its directors in third party actions if they acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the bank; and in actions by or in the right of the bank in the same manner, except that no indemnification may be made of any claim as to which the person has been adjudged to be liable to the bank unless a court determines that such person is fairly entitled to indemnity. The indemnification as to third party actions covers expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred; the indemnification as to actions by or in the right of the bank run only to expenses (including attorneys' fees). The Articles also authorize but do not require indemnification of officers, employees or agents of the bank in the same manner and to the same extent provided above as to directors; any indemnification is effective only as authorized in the specific case upon a determination that indemnification is proper under the circumstances, with such determination to be made by a majority vote of a quorum of directors of the bank not parties to the action, or by independent legal counsel or the stockholders of the bank.

You questioned whether 12 C.F.R. §7.5217 authorizes or allows a national bank to adopt and act in accordance with articles which allow indemnification of officers (except in actions brought by or on behalf of the bank) with regard to judgments, fines and settlements, as well as expenses, as long as the provisions substantially reflect general standards of law as evidenced by the law of the state in which the bank is headquartered or the law of the state in which its holding company is incorporated. The OCC interprets §7.5217 as permitting such payments.

12 C.F.R. §7.5217(a) states that:

> A national bank may provide in its articles of association for the indemnification of directors, officers, and employees for *expenses* reasonably incurred in actions to which the directors, officers, or employees are parties or potential parties by reason of the performance of their official duties. Indemnification articles which substantially reflect general standards of law as evidenced by the law of the state in which the bank is headquartered, the law of the state in which the bank's holding company is incorporated, or the relevant provisions of the Model Business Corporation Act ("MBCA") are presumed by the Office of the Comptroller of the Currency to be within the corporate powers of a national bank. (emphasis added)

Section 7.5217 does not define the term "expenses." Nevertheless, one can determine whether judgments, fines, and settlements were intended to be covered by examining the MBCA.

Section 7.5217 was revised in 1984 "to recognize that a national bank, with certain limitations may adopt indemnification standards which reflect either general corporate law standards, as evidenced by the law of the state in which it is headquartered, or the standards suggested in section 5 of the MBCA as drafted by the American Bar Association." 49 Fed. Reg.

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ARTICLES OF ASSOCIATION

OF

THE FIRST NATIONAL BANK OF TOMS RIVER, N.J.

For the purpose of organizing an Association to carry on the business of banking under the laws of the United States, the undersigned do enter into the following Articles of Association:

FIRST. The title of this Association shall be "The First National Bank of Toms River, N.J."

SECOND. The Main Office of the Association will be 40 Main Street, Toms River, New Jersey 08753, County of Ocean, State of New Jersey. The general business of the Association shall be conducted at its main office and its branches.

THIRD. The Board of Directors of this Association shall consist of not less than five nor more than twenty-five shareholders, the exact number to be fixed and determined from time to time by resolution of a majority of the full Board of Directors or by resolution of the shareholders at any annual or special meeting thereof. Each director shall own $1,000 equity interest in this national bank or in a company which has control of the bank. Amount of the specified interest conforms to the requirement of 12 U.S.C. 72 as amended March 31, 1980. Any vacancy in the Board of Directors may be filled by action of the Board of Directors.

FOURTH. There shall be an annual meeting of the shareholders, the purpose of which shall be the election of Directors and the transaction of whatever other business may be brought before said meeting. It shall be held at the main office or other convenient place as the Board of Directors may designate, on the day of each year specified therefore in the By-Laws, but if no election is held on that day, it may be held on any subsequent day according to such lawful rules as may be prescribed by the Board of Directors.

Nominations for election to the Board of Directors may be made by the Board of Directors or by any stockholder of any outstanding class of capital stock of the Bank entitled to vote for election of directors. Written notice of said nominations shall be given to the Association's parent bank holding company at least 30 days prior to the date set for the annual meeting of the shareholder for the election of Directors.

FIFTH. The authorized amount of capital stock of this Association shall be 24,000,000 shares of common stock of the par value of TWO DOLLARS AND FIFTY CENTS ($2.50) each; but said capital stock may be increased or decreased from time to time, in accordance with the provisions of the laws of the United States.

If the capital stock is increased by the sale of additional shares thereof, each shareholder shall be entitled to subscribe for such additional shares in proportion to the number of shares of capital stock owned by him/her at the time the increase is authorized by the shareholders, unless another time subsequent to the date of the shareholders' meeting is specified in a resolution by the shareholders at the time the increase is authorized. The board of directors shall have the power to prescribe a reasonable period of time within the preemptive rights to subscribe to the new shares of capital stock must be exercised.

The Association, at any time and from time to time, may authorize and issue debt obligations, whether or not Subordinated, without the approval of the shareholders.

SIXTH. The Board of Directors shall appoint one of its members President of this Association, who shall be Chairperson of the Board, unless the Board appoints another director to be Chairperson. The Board of Directors shall have the power to appoint one or more Vice Presidents; and to appoint a Cashier and such other officers and employees as may be required to transact the business of this Association.

The Board of Directors shall have the power to define the duties of the officers and employees of the Association; to fix the salaries to be paid to them; to dismiss them; to require bonds from them and to fix the penalty thereof; to regulate the manner in which any increase of the capital of the Association shall be made; to manage and administer the business and affairs of the Association; to make all By-Laws that it may be lawful for them to make; and generally to do and perform all acts that it may be legal for a Board of Directors to do and perform.

SEVENTH. The Board of Directors shall have the power to change the location of the main office to any other place within the limits of Toms River, Dover Township, Ocean County, New Jersey, without the approval of the shareholders but subject to the approval of the Comptroller of the Currency; and shall have the power to establish or change the location of any branch or branches of the Association to any other location, without the approval of the shareholders but subject to the approval of the Comptroller of the Currency.

EIGHTH. The corporate existence of this Association shall continue until terminated in accordance with the laws of the United States.

NINTH. The Board of Directors of this Association, one or more shareholders owning, in the aggregate, not less than ten percent of the stock of this Association, may call a special meeting of sharesholders at any time. Unless otherwise provided by the laws of the United States, a notice of the time, place, and purpose of every annual and special meeting of the shareholders shall be given by first-class mail, postage prepaid, mailed at least one day prior to the date of such meeting to each shareholder of record at his/her address as shown upon the books of this Association.

TENTH. (1) As used in this Article

(a) "corporate agent" means any person who is or was a director, officer, employee or agent of this Association and any person who is or was a director, officer, trustee, employee or agent of any other enterprise, serving as such at the request of this Association, or the legal representative of any such director, officer, trustee, employee or agent;

(b) "other enterprise" means any domestic or foreign corporation, other than this Association, and any national banking association, partnership, joint venture, sole proprietorship, employee benefit plan, trust or other enterprise, whether or not for profit, served by the corporate agent;

(c) "expenses" means reasonable costs, disbursements and counsel fees;

(d) "liabilities" means amounts paid or incurred in satisfaction of settlements, judgments, fines and penalties;

(e) "proceeding" means any pending, threatened or completed civil, criminal, administrative or arbitrative action, suit or proceeding, and any appeal therein and any inquiry or investigation which could lead to such action, suit or proceeding;

(f) "paragraph" means the paragraphs of this Article.

2(a) A director shall not be personally liable to this Association or its shareholders for damages for breach of any duty owed to this Association or its shareholders, except for liability for any breach of duty based upon an act or omission (i) in breach of such person's duty of loyalty to this Association or its shareholders, (ii) not in good faith or involving a knowing violation of law or (iii) resulting in receipt by such person of an improper personal benefit.

(b) An officer shall not be personally liable to this Association or its shareholders for damages for breach of any duty owed to this Association or its shareholders, except for liability for any breach of duty based upon an act or omission (i) in breach of such person's duty of loyalty to this Association or it shareholders, (ii) not in good faith or involving a knowing violation of law or (iii) resulting in receipt by such person of an improper personal benefit.

(c) If the New Jersey statute permitting the provisions of this article is amended after approval by the shareholders of this Section 2 of Article Tenth to authorize corporate action further limiting the personal liability of directors or officers, the liability of a director or officer of this Association shall be limited to the fullest extent permitted by the New Jersey statute, as so amended from time to time.

(d) In the event the New Jersey statute permitting the provisions of this article is changed or expires with respect to either officers or directors,

such a change or expiration shall not affect or invalidate those provisions of this article which remain in accordance with law.

(3) This Association shall indemnify a corporate agent against his expenses and liabilities in connection with any proceeding involving the corporate agent by reason of his being or having been such corporate agent, other than a proceeding by or in the right of this Association, if

(a) such corporate agent acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of this Association; and

(b) with respect to any criminal proceeding, such corporate agent had no reasonable cause to believe his conduct was unlawful.

The termination of any proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not of itself create a presumption that such corporate agent did not meet the applicable standards of conduct set forth in this paragraph.

(4) This Association shall indemnify a corporate agent against his expenses in connection with any proceeding by or in the right of this Association to procure a judgment in its favor which involves the corporate agent by reason of his being or having been such corporate agent, if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of this Association. However, in such proceeding no indemnification shall be provided in respect of any claim, issue or matter as to which such corporate agent shall have been adjudged to be liable to this Association, unless and only to the extent that the Superior Court of New Jersey or the court in which such proceeding was brought shall determine upon application that despite the adjudication of liability, but in view of all circumstances of the case, such corporate agent is fairly and reasonably entitled to indemnity for such expenses as the Superior Court of New Jersey or such other court shall deem proper.

(5) This Association shall indemnify a corporate agent against expenses to the extent that such corporate agent has been successful, on the merits or otherwise, in any proceeding referred to in paragraphs (3) and (4), or in defense of any claim, issue or matter therein.

(6) Any indemnification under paragraph (3), and, unless ordered by a court, under paragraph (4), may be made by this Association only as authorized in a specific case upon a determination that indemnification is proper in the circumstances because the corporate agent met the applicable standard of conduct set forth in paragraph (3) or paragraph (4). Such determination shall be made

(a) by the board of directors or a committee thereof acting by a majority vote of a quorum consisting of directors who were not parties to the proceeding; or

(b) if such a quorum is not obtainable, or, even if obtainable and a quorum of the board of directors or committee by a majority vote of the disinterested directors so directs, by independent legal counsel in a written opinion; or

(c) by the shareholders.

(7) Expenses incurred by a corporate agent in connection with a proceeding may be paid by this Association in advance of the final disposition of the proceeding as authorized by the board of directors upon receipt of an undertaking by or on behalf of the corporate agent to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified as provided in this Article.

(8) The indemnification and the advancement of expenses provided by or granted pursuant to this Article shall not exclude any other rights to which a corporate agent may be entitled under an Article of Association, by-law, agreement, vote of shareholders or disinterested directors, or otherwise; provided that no indemnification shall be made to or on behalf of a corporate agent if a judgment or other final adjudication adverse to the corporate agent establishes that his acts or omissions (a) were in breach of his duty of loyalty to the corporation or its shareholders, (b) were not in good faith or involved a knowing violation of law or (c) resulted in receipt by the corporate agent of an improper personal benefit.

(9) This Association shall provide indemnification to its corporate agents to the fullest extent permitted by New Jersey law, it being the policy of this Association to safeguard its corporate agents from expense and liability for actions they take in good faith in furtherance of the interest of this Association and its shareholders.

(10) This Association may purchase and maintain insurance on behalf of any corporate agent against any expenses incurred in any proceeding and any liabilities asserted against him in his capacity as corporate agent, whether or not this Association would have the power to indemnify him against such expenses and liability under the provisions of this Article, except that such insurance excludes coverage when a formal order is issued assessing civil money penalties against a corporate agent.

<u>ELEVENTH</u>. These Articles of Association may be amended at any regular or special meeting of the shareholders by the affirmative vote of the holders of a majority of the stock of this Association, unless the vote of the holders of a greater amount of stock is required by law, and in that case by the vote of the holders of such greater amount.